IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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No. 856

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U.S.A.C. TRANSPORT, INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

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**On Appeal from the United States District Court for the District of Delaware**

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## REPLY TO MOTION TO AFFIRM

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Comes now U.S.A.C. Transport, Inc., appellant, and respectfully files this reply to the motion to affirm submitted by the appellees pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court.

### I

By filing a motion to affirm under Paragraph 1(c) of Rule 16, appellees are urging that the questions on

which the decision of the cause depends are so unsubstantial as not to need further argument. If consideration is given to the affidavits and statements attached to the motion for stay pending appeal before this Court, it will be evident that the questions presented are very substantial insofar as appellant is concerned, as they affect its continued operations as a motor carrier for the aerospace industry. Moreover, consideration should be given to the fact that appeal to this Court is the only appeal allowed from a three-judge statutory court decision, affirming a decision of the Interstate Commerce Commission (Commission).

If the courts bestow upon the Commission practically unfettered authority to interpret a motor carrier's Certificate regardless of the devastating effect thereof, judicial review in such matters becomes little more than a formality. The basic thesis of appellees appears to be that the Commission is a body inviolate, and that regardless of how the Commission construes the terms of a Certificate of Public Convenience and Necessity, it can do no wrong. In effect, the Commission is espousing the doctrine of *ipse dixit*. It is fundamental, however, that the Commission must make findings that support its decision and those findings must be supported by substantial evidence. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, (1962); *Interstate Commerce Commission* v. *J-T Transport Company,* 368 U.S. 81, 93. It is respectfully submitted that there is no evidence to support the Commission's interpretative ruling and that said ruling is based on erroneous concepts.

A Certificate of Public Convenience and Necessity is a franchise bestowing upon the holder the legal privilege of performing interstate trucking service; it

is a legal document that bestows property of value in the holder thereof. *Rock Island Motor Transit Co.* v. *U.S.*, 90 F. Supp. 516, reversed on other grounds, 340 U.S. 419, and *Texas & Pacific Motor Transport Co.* v. *U.S.*, 87 F. Supp. 107, reversed on other grounds, 340 U.S. 450. Thus, when the meaning of an important term in a Certificate of Public Convenience and Necessity is restricted or reduced in scope under the guise of interpretation and after years of a known different interpretation of such term and openly conducted operations thereunder, it is a deprivation of a vested property right without due process of law. *Movers Conference of America* v. *United States*, Calif., 205 F. Supp. 82, 84 (1962) (not appealed). An interpretative ruling should be based on something more than uninformed or misinformed beliefs.

Appellees cite *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558, in support of the proposition that an interpretation of a Certificate is primarily a question for the Commission and should not be disturbed unless clearly erroneous. In the *Nelson* case, however, this Court indicated that plain or ordinary meanings of words in a commodity description should *not* be resorted to where there is any indication of "specialized usage" of such words in the trade. The record in the Commission proceeding (*Dealers Transit*) shows that the witnesses for Northrup Corp., Norair Division, and for Convair Astronautics, a division of General Dynamics, testified that, in their opinion, the commodity description "aircraft parts" includes missile parts. (R. 70, 211)[1] There was no evidence adduced to support a different view.

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[1] "R" refers to pages in the hearing transcript in *Dealers Transit*.

In view of the evidence of specialized usage in the trade of the term "aircraft", it should be clear that the lower court erred in affirming the Commission's interpretation based upon an alleged ordinary meaning. It is arbitrary and capricious for the Commission to ignore trade or industry concepts when for reasons of its own it prefers to rely on alleged baseless "ordinary" meanings.

Appellees urge that the Commission may properly follow "common usage" but fail to specify how the Commission determines such usage. They also fail to explain the divergence in opinion regarding the meaning of "aircraft" between the three Commission Hearing Examiners, the Commission's Bureau of Motor Carriers and at least two aerospace officials, on the one hand, and, on the other, the Commission itself.[2]

Appellant's argument regarding the necessity of a full hearing in the circumstances here present is met by reference to a so-called motion to dismiss, orally made at the hearing, which was never ruled upon by the Commission. Appellees fail to recognize that the presiding examiner in *Dealers Transit* was only concerned with hearing evidence dealing with the need for motor carrier service on the commodities concerned in that proceeding. (R. 68-73) Moreover, because those in favor of the Examiner's ruling on the interpretative issue understandably may have magnified the effect of the recommended decision on this issue does not support the lower court's adoption (J.S. 8a) of appellees' argument that all of the parties recognized from the commencement of the *Dealers Transit* pro-

[2] Two members of the Commission dissented on the interpretation issue in *Dealers Transit* and two Commissioners did not participate. (J.S. 24a)

ceeding that the Commission would determine the broad issue of whether "aircraft" includes missiles.

If appellant received a plenary hearing, it is not clear from the Commission decision, where no consideration was accorded to the evidence submitted by the aerospace officials, mentioned above, or the evidence presented by the U.S.A.C. witness regarding his company's past and substantial operations in the transportation of guided missiles and guided missile parts. (R. 116-135, Exh. Nos. 17-27) The Commission's findings or conclusions (J.S. 21a) relating to the alleged distinctions between aircraft and missiles are not based on the record but are purely uninformed views. Finally, if the Commission properly may base an interpretation upon an alleged "ordinary meaning" and not on the record, evidence of technological matters would not have affected the ultimate issue in any event, according to the lower court. (J.S. 8a)

Appellant had a right to rely on the informal ruling issued in April 1954 by the then Director of the Bureau of Motor Carriers (Appendix D, Complaint). To paraphrase the Court in *Parkhill Truck Co.* v. *United States*, 198 F. Supp. 362 (1961), the Commission, at least at the level of its Bureau of Motor Carriers, was aware that U.S.A.C. was transporting guided missiles and guided missile parts under its "aircraft" authority. Yet, it brought no cease-and-desist proceeding against U.S.A.C. As stated in *Parkhill*, when trucking services have been performed by a carrier under a claim of right with knowledge of the Commission and without adverse action by the Commission, any doubt as to such carrier's operating authority should be determined in a plenary proceeding.

## II

Appellees contend that an interpretation of a Certificate by the Commission is primarily a question for that agency; and unless the interpretation is clearly erroneous, it is controlling on the courts. As a corollary, it is urged that the Commission, in construing the terms of a Certificate, is not required to follow technical definitions or give controlling weight to the phraseology employed by officials in the aerospace industry. These propositions are perhaps appealing when viewed in a theoretical vacuum without relation to the history of this proceeding and the fundamental facts. The Commission, however, is charged with the function of regulating a dynamic transportation industry which must meet the changing needs of the shipping public and the defense requirements of our nation.

Following World War II when the aircraft industry began to develop a variety of unmanned and remotely controlled flight vehicles, including guided missiles, the Commission's Bureau of Motor Carriers informally ruled that these more sophisticated aircraft and aircraft parts "are considered to be in categories which are almost identical" with the traditional aircraft which preceded them, and that the Commission would follow generally accepted industry meanings in treating these newly developed vehicles and parts as falling within the general category of aircraft and aircraft parts. Certainly, both the carriers and the nation's aerospace industry had a right to rely upon these expressions of policy by the Commission and did, in fact, heavily rely upon them.

The affidavit of appellant's vice-president, accompanying the motion for stay pending appeal, estab-

lishes that appellant has relied upon these informal rulings and generally accepted trade meanings for many years and that 35 percent of its gross revenues, or almost 2,000 truckloads annually, now consists of missiles, missile parts and related traffic which appellant would lose by the Commission's arbitrary reversal of its prior informal rulings. More important than the harm to appellant is the irreparable injury which would be caused to the nation's defense effort and the many aircraft companies which have been working under Government contracts for the development and production of rocket engines, missiles, launch vehicles, booster units, spacecraft, satellites, and many other vehicles designed to operate beyond the earth's atmosphere in either manned or unmanned flight.

Sworn statements from many "blue ribbon" companies in the aerospace field were submitted in the lower court and are part of the record on appeal. A summary of these statements is set forth in the appendix hereto. The major aircraft companies shown in this appendix have relied upon appellant's services for periods ranging up to sixteen years and for hundreds of movements annually of many and varied aircraft and parts thereof, developed either for our defense effort or for our space program. These verified statements conclusively establish that a continuation of appellant's service is essential to these organizations if they are to discharge their obligations to the nation.

Appellees' argument would sweep all of these considerations aside and would have this Court treat the problem as one that is purely academic, involving nothing more than a dictionary definition versus an industry definition. The real problem here, however, is a very practical one. Over a period of more than ten

years, the aerospace industry has relied upon the informal rulings of the appellee Commission, which heretofore agreed with the industry's interpretation of the term "aircraft and aircraft parts". The completely unexpected and arbitrary reversal of this interpretation by the decision in *Dealer Transit* and *Baggett* adversely affects many aerospace companies as well as the national defense effort itself.

The sworn statement of appellant's vice-president, mentioned above, indicates that U.S.A.C. has filed with the Commission an application for appropriate authority to continue its existing operations in the transportation of missiles, spacecraft, satellites and parts thereof; and a copy of this application was attached to such statement. At the very least, the appellant and the aerospace industry are entitled to an opportunity to secure a determination of this application and preserve the transportation pattern established over a period of ten years or more in reliance upon the informal rulings of the appellee Commission. If the appellee's motion to affirm were granted, it would constitute not only a denial of due process by depriving appellant of property of value, but would cause irreparable injury to the aerospace industry and indirectly to our national space program and defense efforts.

## CONCLUSION

It is respectfully submitted that the questions presented do not manifestly lack substantiality. Appellant is entitled to an informed, objective and rational interpretation of its operating authority, considering its investment in equipment, facilities, trained personnel, and its many years of openly conducted operations in the transportation of missiles and missile parts.

The transportation needs of the shipping public, including the defense establishment, which appellant has served for years, also should not be overlooked. The Commission's extraordinary action here, which is unreasonable, arbitrary, and an abuse of discretion, may not properly be condoned.

WALTER N. BIENEMAN
Suite 1700,
One Woodward Avenue
Detroit, Michigan 48226

PAUL F. SULLIVAN
Barr Building
910 - 17th Street, N. W.
Washington, D. C. 20006
*Attorneys for Appellant*

*Of Counsel:*

WILLIAM E. KENNEDY
Marco and Marco
Penobscot Building
Detroit, Michigan 48226

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## APPENDIX

### Summary of Aircraft and/or Aerospace Companies Relying on U.S.A.C. Transport for Essential Transportation in Defense or Related Activities

| Aircraft and/or Aerospace Company | Years Using U.S.A.C. | Number of Shipments Annually | Commodities Shipped Via U.S.A.C. | Reasons Why Continued Service of U.S.A.C. Essential to Shipper |
|---|---|---|---|---|
| (1) N.A.S.A.—Marshall Space Flight Center, Huntsville, Alabama | 4 | 150 | Launch vehicle engines and components for space exploration (both manned and unmanned) | Special equipment, experience, single-line service, ability to meet demanding schedules. Interruption of service would seriously handicap national space program |
| (2) Thiokol Chemical Corp. | 4 | 250 | Rocket motor cases, nozzles, and empty containers for cases and nozzles (missiles and spacecraft) | Exceptionally fast service and specialized equipment |
| (3) Curtis-Wright Corp. | 6 | 100 | Jet engines and rocket motor cases | Specialized equipment, security-cleared personnel, single-line service |
| (4) The Bendix Corporation | 10 | 100 | Missiles | Special equipment and ability to meet schedules |
| (5) Western Electric Company | 8 | 50 | Guidance equipment for Titan and Nike missiles | Special equipment and experienced personnel |
| (6) Hercules Powder Company | 8 | 115 | Navy Polaris missile, Air Force Minuteman, and other similar missiles and component parts | Special equipment and service |
| (7) Martin Company (Florida Plant) | 6 | 80 | Guided missiles, parts, containers, and propelling units | Service and ability to meet schedules |
| (8) United Aircraft Corp. | 7 | 150 | Rocket engines, controls, component parts of missiles and spacecraft | Special equipment, experience, single-line service |
| (9) Republic Aviation Corp. | 12 | 200 | Missile parts, equipment, jet engines and after-burners | Equipment and personnel |
| (10) Hughes Aircraft Company | 6 | 100 | Falcon missiles and components | Special equipment, personnel, and service |
| (11) N.A.S.A.—Manned Spacecraft Center—Houston, Texas | | | Spacecraft and parts, test equipment, and supporting equipment | Special equipment for oversize loads and necessity to meet close schedules |

| Aircraft and/or Aerospace Company | Years Using U.S.A.C. | Number of Shipments Annually | Commodities Shipped Via U.S.A.C. | Reasons Why Continued Service of U.S.A.C. Essential to Shipper |
|---|---|---|---|---|
| (12) McDonnell Aircraft Corp. | 16 | 200 | Aircraft, missiles, spacecraft, component parts and equipment | Equipment and specialized service |
| (13) Goodyear Aerospace Corp. | 16 | 20 | NASA Mock-up Re-entry Vehicle, Nike and Mace Missiles, components, and evaluation equipment | Experienced personnel and specialized service |
| (14) Grumman Aircraft Engineering Corp. | 10 | 75 | Aircraft and parts, space vehicles and related components | Single-line service and ability to meet schedules |
| (15) Martin Company (Baltimore Plant) | 15 | 10 | Aircraft, missiles, sub-assemblies and parts | Service and ability to meet schedules |
| (16) Lycoming Division of Avco Corp. | 8 | 100 | Aircraft and missile engines, engine containers and parts | Equipment and service |
| (17) The Boeing Company, Airplane Division—Witchita | 10 | 34 | Aircraft parts and missile parts | Need specialized equipment and experienced personnel to meet schedules |
| (18) The Kaman Aircraft Corp. | 10 | 12 | Helicopters, drones, unmanned aircraft | Equipment and service |